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In the Supreme Court of the United States

OCTOBER TERM, 1960

KERR STEAMSHIP CO., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND
FEDERAL MARITIME BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

ARCHIBALD COX,
Solicitor General,
Department of Justice, Washington 25, D.C.

JAMES L. PIMPER,
General Counsel,
Federal Maritime Board, Washington 25, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 623

KERR STEAMSHIP CO., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND
FEDERAL MARITIME BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

The decision below (Pet. Appendix A) affirmed an order of the Federal Maritime Board issued under Section 21 of the Shipping Act (46 U.S.C. 820) requiring every common carrier by water subject to the Shipping Act of 1916, as amended, to file with the Board copies of specified types of agreements. Although the Government believes that this decision was correct and that it raises no issues of sufficient general importance to warrant further review, we suggest, for the reasons set forth below, that the Court may wish to defer action on the present petition pending disposition of a group of related cases arising out of the same Board order which are now pending in a different circuit.

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As the petition indicates (Pet. 8-9), some 45 consolidated petitions involving the validity of the same order (but also presenting in some instances special issues not involved in the instant case) are now *sub judice* in the Court of Appeals for the District of Columbia Circuit. See *Montship Lines, Limited, et al.* v. *United States of America, et al.*, No. 15,783 *et al.* Since proceedings challenging the same Board order were originally instituted in the Second Circuit and District of Columbia Circuit on the same date, June 8, 1960,[1] the transfer provisions of 28 U.S.C. 2112(a)[2] did not apply. There does not appear to be any barrier to concurrent consideration of the several cases by the two courts of appeals, even assuming that some question might have been raised if the first petition for review of the order had been filed in the District of

[1] On this date a petition to review the Board's "all agreements" order, in issue here, was filed in the Second Circuit in *States Marine Lines, Inc. et al.* v. *United States and Federal Maritime Board*, Case No. 26318 (C.A. 2) and the District of Columbia Circuit in *Montship Lines Ltd., et al.* v. *United States and Federal Maritime Board*, Case No. 15,783 (C.A.D.C.). The *Kerr* case (No. 26334) in which the Second Circuit rendered its decision (because there, unlike *States Marine*, stay had been sought and granted) was filed on June 10, 1960.

[2] This section in relevant part provides:

"* * * If proceedings have been instituted in two or more courts of appeals with respect to the same order the * * * board * * * shall file the record in that one of such courts in which a proceeding with respect to such order was first instituted. The other courts in which such proceedings are pending shall thereupon transfer them to the court of appeals in which the record has been filed. * * *"

Columbia Circuit but the Second Circuit had nonetheless proceeded to decision in the case before it.[3]

In view of the fact that the cases pending before the Court of Appeals for the District of Columbia Circuit were argued on January 16, 1961, and are now under consideration by that court, it would seem appropriate for this Court to defer action upon the instant petition to await the determination of the pending cases in the District of Columbia Circuit. (We shall, of course, promptly file with the Court copies of the opinions and decisions rendered in those cases.) Such a procedure would not substantially affect the progress of the Board's current investigation. Only ten carriers are involved in the present petition, and, while their compliance with the Board's order has been stayed pending action on the petition, the operation of the order has in any event been stayed pending appeal with respect to the approxi-

[3] The legislative history of Section 2112 makes clear that its purpose was to eliminate the duplication of often voluminous agency records and the other expenses of multiple proceedings to review the same administratve order, and to permit the courts of appeals, rather than the agency (as had been the former practice, see *Columbia Oil & Gasoline Corp.* v. *SEC*, 134 F. 2d 265 (C.A. 3)), to determine which forum would best serve the convenience of the parties. See H. Rept. 842, 85th Cong., 1st Sess., pp. 4–5, 29; Sen. Rept. 2129, 85th Cong., 2d Sess., pp. 1, 4; Hearings Before Subcommittee No. 3, Committee on the Judiciary, House of Reps., 84th Cong., 2d Sess., May 17, 1956, pp. 11–12, 13, 14, 30.

mately 190 petitioners and intervenors involved in the pending District of Columbia Circuit cases.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

JAMES L. PIMPER,
General Counsel,
Federal Maritime Board.

FEBRUARY 1961.